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POSTAL RATE COMMISSION OFFICE OF THE SECRETARY

SPECIAL SERVICES FEES AND CLASSIFICATIONS, 1996)

Docket No. MC96-3

NASHUA PHOTO INC. & MYSTIC COLOR LAB
REPLY MEMORANDUM REGARDING THEIR
MOTION TO ENLARGE SCOPE OF PROCEEDING FOR CONSIDERATION OF
CLASSIFICATION MODIFICATION WITH RESPECT TO BUSINESS REPLY MAIL
(July 31, 1996)

Nashua Photo Inc. ("Nashua") and Mystic Color Lab ("Mystic") respectfully file this Reply to the Postal Service's Opposition to their Motion to enlarge these proceedings to consider a specific modification to the Domestic Mail Classification Schedule ("DMCS") with respect to Business Reply Mail ("BRM").¹

Postal Service opposition to the Nashua/Mystic proposal is reminiscent of Postal Service reactions over the years to a wide variety of classification proposals suggested by intervenors. At its core, the Postal Service opposition appears founded on the view that it should have unilateral and total control, exercised in its unreviewable and unfettered discretion, over which classification matters are heard by the Commission. That view is not supported by either the Postal Reorganization Act or decisions of this Commission. In the area of classification changes, the Commission has control over its own docket, and it is for the Commission to decide which matters are heard and when.

The Office of the Consumer Advocate also filed a response to the Nashua/Mystic Motion dated July 25, 1996, which "supports an investigation of Business Reply Mail (BRM) and the alleged lower costs of processing BRM in bulk," but suggests that it would be better to consider BRM in another proceeding or in a second phase of this proceeding. This reply addresses the points made by the OCA, principally the speculative assertion that considering a limited BRM proposal in this docket could result in discovery disputes and delay, despite the potential merit of the proposal itself.

<u>ARGUMENT</u>

Interestingly, the only decision Postal Service cites as authority for its position against giving even a hearing to the Nashua/Mystic proposal is Commission Order No. 1064, issued in Docket No. MC95-1. The Postal Service implicitly represents that the circumstances surrounding that order are comparable to the instant proposal, but the analogy is fundamentally unsound.

In Docket No. MC95-1, UPS filed a motion to compel responses by Postal Service Witnesses Treworgy and Hume to UPS interrogatories which had been objected to by the Postal Service as burdensome. The interrogatories in question dealt with "transportation and delivery costs, by shape, for Priority Mail." (Order No. 1064, at 2.) UPS argued that the information was relevant because the Postal Service had proposed DMCS changes redefining all existing classes and services, and "UPS suggests that parties may propose alternatives involving Priority Mail." (Id.) The Commission's analysis stated that the key question in resolving the discovery dispute was the "likelihood that the Commission will address substantive changes to Priority Mail in this case." The Commission chose not to do so because the case "already involves complex issues affecting numerous mailers and mail related industries. The Postal Service had not proposed substantive changes to Priority Mail," and "the Commission has determined that administrative efficiency requires that the matter be considered in a separate docket" (which the Postal Service had said that it was in the process of preparing). The Commission concluded that the matter could be postponed

because "issues related to the structure of Priority Mail will be reviewed in the future." $(Id.)^2$

The Postal Service attempts to draw a parallel to the instant case by stating that this proceeding "already involves complex issues pertaining to various users of several special services other than BRM." Elsewhere the Postal Service argues that BRM issues "should be expected to be contentious and could significantly delay these proceedings." (Id., at 5.)³

For example, Nashua distributes specially-designed envelopes into which exposed film is placed for mailing to Nashua for developing and printing. Nashua has converted some of these envelopes to Business Reply Mail, but since these pieces contain exposed rolls of film they are not "automatable" and are not allowed to qualify as BRMAS mail. Nevertheless, working with the Postal Service, Nashua has established a sophisticated incoming manifest system in which Nashua personnel input information on every arriving film order so that each day its computer generates a complete report for the Postal Service as to the amount of postage and BRM fees owed.

It should also be noted that UPS did not seek permission to expand the scope of Docket No. MC95-1 at the outset of the docket to consider a particular proposal, as Nashua/Mystic have done here. Rather, UPS had identified no particular proposal for Priority Mail, and rather merely raised the possibility of such a proposal as justification for obtaining certain data. UPS' suggestion that it may have wanted to make a proposal for Priority Mail came in its motion (June 13, 1995) filed two and one-half months after the Commission Order commencing the docket (March 28, 1995). In this case, as requested by the Commission, the issue was noticed by Nashua/Mystic in their Statement of Issues filed July 9, 1996, the proposal was raised by Nashua/Mystic at the Initial Prehearing Conference on July 12, 1996, and the motion was filed promptly thereafter on July 15, 1996, with all steps occurring pursuant to the Commission's schedule and as close to the commencement of the docket (June 12, 1996) as was practicable.

The vast majority of BRM mail is automatable and pays the BRMAS rate. In prior dockets, issues concerning the attributable cost and appropriate rate for automatable BRM mail have been contentious. Within the context of the Nashua/Mystic proposal, these issues are presumed to be resolved, and Nashua/Mystic do not seek to re-litigate any of those issues. Rather, the Nashua/Mystic proposal focuses on a novel issue not heretofore raised namely, non-automatable BRM mail that, because of the quantity received, enables adoption and use of handling and accounting procedures that require the Postal Service to incur little or no cost.

Surely, the Postal Service cannot be representing to the Commission that the complexity of reclassifying the totality of First-Class, second-class and third-class mail is comparable to the reclassification proposed for six Special Services in this docket. Not including the Postal Service and the OCA, in Docket No. MC95-1 there were 44 intervenors, compared with only nine in the present docket. Despite the vastly smaller scope of the current docket, the Commission's recently published Procedural Schedule provides the same "ten-month" schedule as it utilized in Docket No. MC95-1 and uses for omnibus rate cases. Clearly, this "ten-month" schedule provides ample time to consider as an additional matter the modest proposal for reclassification of one Special Service sought to be offered by these intervenors.

In Docket No. MC95-1, the Postal Service could represent credibly that there would be a subsequent reclassification case for Priority Mail. The Postal Service has consistently stated that the first phase of reclassification would deal with First-Class, second-class and third-class mail (Docket No. MC95-1), the second phase would deal with nonprofit mail (Docket No. MC96-2), and subsequent dockets would deal with Special Services, then Expedited Mail (Priority and Express Mail) and parcels. Now that the Special Services

Incoming orders are delivered to Nashua by truck, and from the time of the opening of the sacks forward, all work is performed exclusively by Nashua. The Postal Service's ongoing involvement in this procedure is limited to a sampling of the incoming mail for verification purposes. This system results in the Postal Service doing much less work than it does in processing BRMAS mail, and incurring vastly less cost. Nevertheless, the Postal Service does not believe that the current DMCS permits it to charge a reduced rate, such as the rate that it charges for BRMAS mail. Therefore, Nashua pays the 10 cents BRM fee for each piece despite the fact that it does essentially all the work. It is this type of inequity and unfairness that the Nashua/Mystic proposal seeks to correct with an appropriate amendment to the DMCS.

reclassification docket is pending, it would seem difficult for the Postal Service again to argue "not now, later," but apparently it has chosen to do so nonetheless.

By any measure, this docket is fundamentally different from Docket No. MC95-1, and this point is not a revelation to the Postal Service. In his "Dear Participant" letter of July 19, 1996, Postal Service counsel identifies few known objections to the Postal Service's proposals and concludes that "the possibility of partial settlement remains open, especially on the insurance, registry, and stamped card proposals." In fact, it is difficult to believe that even the Postal Service takes seriously its own argument that considering a minor change in BRM would result in "significant delay." Just five days before filing its Opposition to the Nashua/Mystic proposal, the Postal Service advised the Commission that "[a]ctivity in this proceeding has been relatively light, and there are many fewer issues than in an omnibus rate or classification proceeding." (Notice of the United States Postal Service Regarding Partial Settlement, July 19, 1996, at 3, emphasis added.)⁴

Further, the Postal Service states that "[1]imiting the scope of the current docket does not leave Nashua and Mystic without relief." (Opposition, at 5.) In that argument, the Postal Service attempts to leave the impression with the Commission, without making any commitments, that in the near future there will be another opportunity better suited to

The Postal Service itself has recently in this docket described Docket No. MC95-1 as resulting in "sweeping changes in mail classifications..." (Motion to Reconsider Order No. 1120, June 28, 1996), a statement that could hardly be made about the intended results of the instant docket. Further, Docket No. MC95-1 generated substantial intervenor testimony. This should be contrasted with the instant docket where, for example, the OCA has said "if the OCA or other participants decide to file testimony..." (OCA Statement of Issues for Discussion at Prehearing Conference, July 9, 1996, at 1) evidencing the fact that few (if any) parties apparently have the intention of filing any testimony in this docket.

explore the merits of the Nashua/Mystic proposal. The Postal Service references its

Statement on Plans for Business Reply Mail Reform (July 19, 1996), representing that it "is
thus developing BRM reforms separately, and plans to be in a position to take appropriate
action later this year." The Postal Service's cited Statement was filed in response to the
request of the Presiding Officer at the Prehearing Conference (July 12, 1996, Tr. at 1/27).
The substance of the Postal Service's Statement was three sentences long, and committed the
Postal Service to precisely nothing. The substantive portion of the Statement is as follows:

The Postal Service has been conducting a comprehensive review and assessment of all aspects of the BRM program, including the issues which Nashua Photo and Mystic Color Lab wish to raise in this docket. BRM business process re-engineering, including supporting cost analysis, has been initiated as part of this effort. We are moving aggressively to complete this important initiative, and we expect results that will enable us to take appropriate action around the end of the year.

Most significantly, the Statement does not speak to the commencement of a case before the Commission, but rather speaks only of "appropriate action," a phrase cloaked in ambiguity.

Even the Postal Service's Opposition admits that no BRM reclassification case may be filed, describing the Statement as opening "the possibility that there soon will be a BRM reclassification case." (Opposition, at 5, emphasis added.) And the Postal Service admits that were it to propose some changes to BRM but not propose the change advocated by Nashua/Mystic, the docket only "would likely" be extended to include the Nashua/Mystic proposal. (Id.) There is not even an assurance that the Postal Service would agree to the

For an example of the Postal Service's ability to delay actions needed to resolve issues, see the Commission's Opinion and Recommended Decision, Docket No. MC96-2, concerning rates for classroom publications. Another example is an authoritative study -- long sought by the Commission but never produced by the Postal Service -- concerning the effect of weight on costs.

Commission entertaining the Nashua/Mystic proposal at that time, and many of the arguments raised in the current Opposition could be dusted off and used again against Nashua and Mystic if the Commission were to accede to them in this docket.⁶

As stated above, the Postal Service's primary argument against consideration of the Nashua/Mystic proposal is that it was not invented there. This argument is stated in several ways in the Postal Service's Opposition, e.g.: "The Postal Service's Request in this docket embodies the Board of Governors' judgment...." (at 1). "The Board has chosen to limit the current proceeding to selected special services, not including business reply mail (BRM)." (at 1). Of course, although the Board has authority to limit its proposal, it does not have unilateral authority to choose "to limit the current proceeding," as apparently claimed by the Postal Service. If the Postal Service were to have unilateral authority to limit Commission

The OCA's Opposition to the Nashua/Mystic Motion likewise speaks of possible alternate approaches. The OCA says that it is concerned with delay in these proceedings, but the OCA is on record as opposing any effort to expedite these proceedings, preferring the full "ten-month" approach. (OCA Statement of Issues for Discussion at Prehearing Conference, July 9, 1996, at 1.) If the Commission can resolve an omnibus rate case within 10 months, surely it can resolve this case, including the Nashua/Mystic proposal, within the same time frame. The OCA suggests that Nashua/Mystic should initiate a complaint docket (under 39 U.S.C. section 3662). But there is no reason to believe that initiating an entirely separate docket would be any more desirable for anyone. Clearly, if the Postal Service were to utilize the power recently granted to it by the Commission to file an expedited classification proposal, this would have been optimal. But the Postal Service has not chosen do so, reserving all of its options, and the current docket continues clearly to be the best vehicle for the Commission to consider the Nashua/Mystic proposal. Lastly, for the reasons set out herein, the OCA proposal for having the current docket divided into phases would appear to be unnecessary.

The Postal Service seems to try to give the impression that the Board of Governors explicitly considered BRM proposals and made a conscious decision to delete any proposal regarding BRM. This would appear not to have occurred, as the Postal Service also states that it has not yet prepared a BRM request for the Board.

proceedings, the Postal Reorganization Act would have restricted Commission involvement in classification matters simply to accept or reject the proposals of the Postal Service. This may be the way that the Postal Service would have wanted the Postal Reorganization Act to have been written, but it is not the way that the Act is written.

By any standard, the Nashua/Mystic proposal is an extremely modest and manageable reclassification proposal, designed to correct surgically a flaw in the DMCS which, the Postal Service apparently believes, precludes it from offering BRMAS rates to those mailers who use BRM for low-cost but nonautomatable mail. The Nashua/Mystic proposal is designed to adapt the DMCS to real-world mailer practices, one of the Postal Service's previously articulated objectives of reclassification.

No reason exists to assume that the amount of discovery needed from the Postal Service would result in delay of the proceedings.⁸ Indeed, Nashua/Mystic have thus far

Obviously, OCA agrees with Nashua and Mystic in principle, but is reluctant to endorse the Nashua/Mystic motion because of the possibility of delay in this proceeding. It is particularly difficult to fathom OCA's reluctance in view of OCA's own experience. In Docket No. MC95-1, for example, OCA's Courtesy Envelope Mail ("CEM") proposal not only won consideration by the Commission -- over the objection of the Postal Service and several intervenors -- but also convinced the Commission on substantive grounds. And, as the OCA itself points out (OCA Response, pp. 2-5), the Nashua/Mystic proposal would appear to be in harmony with the Commission's policy of favoring discounts based upon cost savings to the Postal Service. Indeed, most of the OCA Response is dedicated to a demonstration of why Nashua/Mystic's proposal should be considered. OCA's only stated reason for not endorsing the Nashua/Mystic motion in toto is the fear of possible "protracted discovery disputes with the Postal Service." (OCA Response, p. 5.) That reason, we would respectfully submit, is woefully inadequate as a basis for denying the Nashua/Mystic motion. Even if there were a basis in the record for fearing that there may be "protracted discovery disputes," and we are not aware of any such basis whatsoever, Nashua/Mystic should not be penalized for any anticipated reluctance on the part of the Postal Service in producing available discoverable information within the framework of the rules. In short, there has been no showing either by the Postal Service or by the OCA that granting the Nashua/Mystic motion would delay this proceeding in any way.

drafted, and will finalize and file if and when the Commission grants their request, a number of interrogatories. If these interrogatories are answered in a forthright fashion, there may not be substantial additional discovery against the Postal Service. Certainly, Nashua/Mystic do not expect, and will not request, that the Postal Service go into the field to develop special studies on BRM in support of this proposal. On the other hand, it is anticipated that the Postal Service will be responsive in presenting the information that it has or advising the Commission that the information sought does not exist. Indeed, the burden is on the proponents of the proposal to produce substantial evidence to support their proposal. If they cannot do so, their proposal will not be recommended. Respectfully, the Commission should not adopt the Postal Service's invitation to foreclose all classification changes not originating with the Postal Service, as the Postal Service seems to propose. The only participants to have filed any interrogatories thus far with the Postal Service in this Docket appear to be the OCA, plus a grand total of 17 interrogatories from a total of two intervenors (the American Bankers Association and UPS). The Postal Service has rarely been asked fewer interrogatories than in this docket. The Postal Service cannot now credibly represent that it is likely to be overburdened and overwhelmed in responding to discovery relative to the Nashua/Mystic proposal.

Lastly, the Postal Service raises the specter of the Commission entertaining the Nashua/Mystic proposal, agreeing with it, and proposing it, but then having the Governors reject it as "an unauthorized rate recommendation" or as "a matter of policy." It is not known what is meant by "an unauthorized rate recommendation" (emphasis added), but the Commission clearly has the authority to make whatever classification recommendation it

believes the record supports. Surely, the mere possibility that the Governors may disagree with a recommended decision and reject the Commission recommendation is no reason for the Commission to fail to recommend whatever the record supports, and to consider such proposals as it believes to be appropriate. If the record supports the Nashua/Mystic proposal, no reason whatsoever exists to believe that the Governors will act arbitrarily and unfairly and reject it just because it was not, in the first instance, proposed by the Postal Service. The only way that the system works is if the Commission carries out its responsibility to make proper recommendations, and if it has confidence that the Governors thereafter will carry out their responsibility to make proper decisions.

Rather than allow the Nashua/Mystic proposal to be heard and considered on its merits, the Postal Service asks the Commission, as well as Nashua and Mystic, to wait approximately five months until the Postal Service completes a review of Business Reply

The Governors have in the past demonstrated their willingness to adopt Commission reclassification recommendations that were made by intervenors, even when the Commission adopted these proposals over the active objection of the Postal Service. In Docket No. MC78-2, the Postal Service proposed the creation of presort discounts for thirdclass mailers, but failed to make a comparable proposal for nonprofit mailers. The Postal Service aggressively argued against even the Commission's consideration of the proposal made by several intervenors, as it is arguing here, but the Commission determined to allow the proposal to be made. (Order No. 221, November 24, 1978). During the case, the Postal Service aggressively opposed the intervenors' proposal, but it was incorporated by the Commission into its recommended Decision. The Commission discussed at length the issue of its authority to expand a classification to consider the proposal of an intervenor. (Op. & Rec. Dec. Upon Reconsideration, March 24, 1980, pp. 8-16.) The Commission viewed the Postal Service's argument that it should not expand a classification docket as placing the Commission in the position of "'an umpire blandly calling balls and strikes..." and, rejecting that argument, stated that "[r]ather we have an affirmative duty to develop facts and make recommendations which further the goals and objectives of the Act...." (Id., at 13.) Thereafter, despite the fact that presort discounts for nonprofit mailers were not a part of its original Postal Service request, the Governors were fully able to consider the proposal on its merits and ultimately adopt the Commission's proposal. (Decision, April 2, 1980.)

Mail at which time it will "take appropriate action." When the current classification provision results in mailers who have cooperated in worksharing being given none of the benefits, but rather paying out hundreds of thousands of dollars per year for negligible work by the Postal Service, delay in even considering the merits of a reform to the DMCS is no answer. It is an inadequate alternative, is no substitute for a hearing on the record, and should be rejected. ¹⁰

CONCLUSION

When all is said and done, the Postal Service reluctance to have the Commission examine the propriety of its current practice of collecting hundreds of thousands of dollars in business reply mail fees while doing negligible work is understandable. However, it is just this type of inequity that the Commission should be willing to examine, and, it is submitted, sooner is much better than later, even if the Postal Service wants later. In the final analysis, Nashua and Mystic may or may not prevail on the merits, based on the record evidence presented, but the Commission should give them their "day in court."

For the foregoing reasons, Nashua and Mystic urge the Commission to rule favorably on their motion expand the scope of this Docket to consider the proposed modification to the DMCS with respect to bulk non-automatable business reply mail.

The need for the Commission to consider the Nashua/Mystic proposal at this time is made even more compelling by the fact that the Postal Service has not even attempted to explain why the current situation is defensible in terms of the anti-discrimination provision of the Act (39 U.S.C. section 403(c)). See Nashua/Mystic motion, at 4. Eliminating this disparate and discriminatory treatment of non-automatable business reply mail would be in furtherance of the goals and objectives of the Postal Reorganization Act.

12

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with Section 12 of the Rules of Practice.

John/S/Miles

July 31, 1996